

Bodolay Packaging Machinery, Inc. and Bodolay/Pratt, Division of Packaging Machinery Company and United Electrical, Radio, and Machine Workers of America (UE). Cases 12-CA-9491 and 12-CA-9584

28 June 1984

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS
HUNTER AND DENNIS

On 11 January 1984 Administrative Law Judge Steven M. Charno issued the attached supplemental decision.¹ The General Counsel filed exceptions and a supporting brief to which the Respondent filed an answering brief. The Respondent also filed a cross-exception to which the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the supplemental decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions,² but not to adopt the Supplemental Order.

In its cross-exception, in which the General Counsel joins, the Respondent seeks only to correct an error in computation contained in the recommended Supplemental Order. The Respondent contends, and an examination of the backpay specification confirms, that the judge inadvertently failed to reduce discriminatee Robert Chartier's gross backpay of \$2845.45 by his interim earnings for the first quarter of 1981, a sum of \$876.24. This results in net backpay due Chartier of \$1969.21. We shall modify the Supplemental Order accordingly.

¹ The original Decision and Order is reported at 263 NLRB 320 (1982).

² The record shows that a Board Order directing the Respondent to reinstate employee Chartier with backpay issued 12 August 1982, and that Chartier was reinstated 18 October 1982. The General Counsel does not allege as a separate theory that the Respondent unlawfully delayed Chartier's reinstatement during this time. Under these particular circumstances, we do not find it appropriate to order backpay for a period of time other than that set forth in the judge's supplemental decision, i.e., from 5 December 1980, the date of Chartier's discharge, until 21 February 1981, the date of the attempted delivery of the Respondent's initial offer of reinstatement.

Member Dennis agrees that Chartier is entitled to backpay from the date of his unlawful layoff until the date of the attempted delivery of the Respondent's offer to reinstate him. She would also find, however, that the backpay liability revived 5 days after the Board's Decision and Order directing the Respondent to offer Chartier reinstatement and ran until the Respondent complied with its obligation. She believes the resumption of backpay liability in this circumstance will ensure that the Respondents fulfill their legal obligation to offer reinstatement. She notes that, contrary to the majority's implication, the General Counsel's argument seeking backpay encompasses the period of time from the date of the Board's Decision and Order directing reinstatement to the date of Chartier's reinstatement.

ORDER

The National Labor Relations Board orders that the Respondent, Bodolay Packaging Machinery, Inc. and Bodolay/Pratt, Division of Packaging Machinery Company, Lakeland, Florida, its officers, agents, successors, and assigns, shall pay to Robert Chartier the sum of \$1969.21, with interest, less tax withholdings required by Federal or state law.

SUPPLEMENTAL DECISION

STEVEN M. CHARNO, Administrative Law Judge. On August 12, 1982, the National Labor Relations Board issued a Decision and Order directing Bodolay Packaging Machinery, Inc. (Bodolay), its successors and assigns, to offer reinstatement to its employee Robert Chartier and to make him whole for any loss of pay resulting from Bodolay's discrimination against him. A controversy having arisen over the amount of backpay due Chartier from Bodolay/Pratt Division of Packaging Machinery Company (Bodolay/Pratt),¹ the successor to Respondent Bodolay, the Regional Director for Region 12 of the Board issued a backpay specification and notice of hearing on July 20, 1983. On August 4, 1983, Respondent Bodolay/Pratt filed an answer admitting certain allegations of the specification and denying others. A hearing was held before me in Tampa, Florida, on September 26, 1983. At the hearing, the parties agreed to waive the presentation of testamentary evidence and jointly stipulated the facts which comprise the record in this case. Briefs were filed under due date of October 31, 1983, by the General Counsel and Respondent.

FINDINGS OF FACT

A. Relevant Events

Chartier was laid off by Respondent on December 5, 1980. Respondent attempted to recall Chartier by sending a certified letter to Chartier's correct address on February 20, 1981. It was stipulated that this letter constituted a valid, good-faith offer of reinstatement. The United States Postal Service unsuccessfully attempted to deliver the certified letter on February 21, 1981. Additional Postal Service notices concerning the letter were delivered to Chartier's address on February 26 and March 8 and 12, 1981. The letter was not claimed and was returned to Respondent on March 27, 1981. Respondent made no further attempt to communicate its offer of reinstatement to Chartier.

At the unfair labor practice hearing which was held in this case on July 14, 1981, Chartier gave direct testimony on behalf of the General Counsel and was cross-examined by Respondent's counsel. Respondent made no attempt at that time to notify Chartier of the "outstanding offer of reinstatement," and Chartier did not request reinstatement during the hearing or at any subsequent point in time.

¹ The name of the successor corporation has been changed from Bodolay/Pratt Division Package Machinery Company to conform to the joint stipulation of the parties.

Administrative Law Judge Donald R. Holley issued his decision in this case on December 31, 1981. That decision contained the finding that Chartier's layoff was discriminatory, but the judge concluded that Chartier's failure to answer the certified letter extinguished Respondent's obligation to reinstate him. The General Counsel took exception to that conclusion. On August 12, 1982, the Board issued a Decision and Order directing Respondent to offer Chartier reinstatement and to make him whole for any loss in pay resulting from Respondent's discrimination against him. Respondent reinstated Chartier on October 18, 1982.

B. Discussion

There is no dispute that Chartier is entitled to backpay from the date of his unlawful layoff on December 5, 1980, until the date of the attempted delivery of the offer of reinstatement on February 21, 1981. The sole issue in this proceeding is whether Chartier is entitled to backpay from the date of the unfair labor practice hearing on July 14, 1981, until the time of his ultimate reinstatement on October 18, 1982.

Respondent's letter of February 20, 1981, was an unsuccessful, good-faith attempt to communicate a valid offer of reinstatement to a discriminatorily laid off employee.² See *Rental Uniform Service*, 167 NLRB 190, 197-198 (1967); *Rollash Corp.*, 133 NLRB 464, 465 (1961); *Jay Co.*, 103 NLRB 1645, 1647 (1953), enfd. 227 F.2d 416 (9th Cir. 1954). While an unsuccessful, good-faith attempt to offer reinstatement does not relieve an employer of its ultimate obligation to reinstate an employee, *Burnup & Sims*, 256 NLRB 965, 966 (1981); *Jay Co.*, supra, it has long been established that such an attempt will toll an employer's backpay liability as of the date of the attempt. E.g., *Rollash Corp.*, supra; *Knickerbocker Plastic Co.*, 132 NLRB 1209, 1236 (1961); *Jay Co.*, supra. The applicability of these principles in this case appears to be uncontested.

The General Counsel contends, however, that Respondent's backpay obligation recommenced on the day Respondent's representatives were present at the same time and place as Chartier and did not reiterate the offer of reinstatement. I have been unable to find any authority in support of this contention, and the two cases cited

by the General Counsel are inapposite. In *Rollash Corp.* and *Jay Co.*, unsuccessful, good-faith attempts to offer reinstatement were held to toll the employers' backpay obligations. Those obligations were held to recommence only when the employers subsequently denied employee requests for reinstatement.

The General Counsel appears to argue in support of its position that, when a good-faith attempt to offer reinstatement is unsuccessful, the employer has an affirmative duty to repeat its offer of reinstatement to the employee if they should at any time thereafter come into contact. The case cited by the General Counsel for the proposition that an affirmative duty should be imposed, *Marlene Industries Corp.*, 234 NLRB 285 (1978), concerned an offer of reinstatement which was made in bad faith and has no persuasive value in the situation before me. In addition to being without authoritative support, the General Counsel's position appears to suffer from two major defects. First, it is not appropriate to penalize Respondent in this case for good-faith reliance on established Board precedent. More importantly, adoption of the General Counsel's position would render almost meaningless the long line of Board decisions which have held that an unsuccessful, good-faith attempt to communicate an offer of reinstatement tolls backpay liability. I do not have the authority to take such a step.

For the foregoing reasons, I conclude that Chartier is entitled to backpay and related benefits only for the period between December 5, 1980, and February 21, 1981. The parties have stipulated that the appropriate backpay for this period is \$2845.45.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended³

ORDER

The Respondent, Bodolay/Pratt Division of Package Machinery Company, Lakeland, Florida, its officers, agents, successors, and assigns, shall satisfy its obligation to make Robert Chartier whole by payment to him of net backpay in the amount of \$2845.45, plus interest thereon accrued to the date of payment computed in the manner prescribed in *Florida Steel Corp.*, 231 NLRB 651 (1977),⁴ minus any tax withholding required by Federal or state law.

² Notwithstanding its stipulation to this effect, the General Counsel appears to question Respondent's good faith by arguing on brief that Respondent could have used other methods to communicate its offer to Chartier. I disagree. Respondent's use of a certified letter directed to Chartier's correct address constituted transmittal of its offer of reinstatement "in good faith and in a manner in which it could be reasonably anticipated that the employee would receive notice of the offer." See *Salem Paint*, 257 NLRB 336, 341 (1981).

³ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

⁴ See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).